DEPARTMENT OF STATE REVENUE

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Supplemental Letter of Findings Number: 06-0528
Controlled Substance Excise Tax
For the Tax Period 2005

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ISSUES

I. Controlled Substance Excise Tax – Commencement of Collection Proceedings

Authority: IC § 6-8.1-5-1(b); IC § 6-7-3-5; IC § 7-3-19(2); IC § 1-1-4-1(1); *Webster's New Riverside University Dictionary* (1988); *Park 100 Dev. Co. v. Indiana Dep't. of State Revenue,* 429 N.E.2d 220 (Ind. 1981).

The Taxpayer protests the commencement of collection of the controlled substance excise tax.

II. Controlled Substance Excise Tax – Duplication of Assessment.

Authority: IC § 6-7-3-5; *Black's Law Dictionary* (5th ed. 1979).

The Taxpayer protests that both she and her husband were assessed controlled substance excise tax.

III. Controlled Substance Excise Tax – Double Jeopardy.

Authority: U.S. Const. amend. V; *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995).

The Taxpayer protests that the tax assessment violates her constitutional protection against double jeopardy.

IV. Controlled Substance Excise Tax – Exclusion of Seized Evidence.

Authority: U.S. Const. amend. IV; *Indiana Dept. of Revenue v. Adams,* 762 N.E.2d 728 (Ind. 2002).

The Taxpayer protests the use of evidence excluded from the criminal action.

V. Controlled Substance Excise Tax – Calculation of Tax.

Authority: IC § 6-7-3-6.

The Taxpayer protests the calculation of the amount of tax.

VI. Tax Administration – Penalty.

Authority: IC § 6-7-3-11.

The Taxpayer protests the imposition of the penalty.

STATEMENT OF FACTS

On May 12, 2005, police seized marijuana from the Taxpayer's house. On September 14, 2006, the Prosecutor of the county where the Taxpayer's house was located requested that the Indiana Department of Revenue (Department) assess and collect the controlled substance excise taxes from the Taxpayer. The Department issued a Record of Jeopardy Finding, Jeopardy Assessment, Notice and Demand on December 12, 2006 in a Controlled Substance Excise Tax (CSET) base tax amount of $20,300. The Taxpayer filed a protest to the assessment. A Letter of Findings denying the protest was issued on March 27, 2007. The Taxpayer subsequently was granted a rehearing which was held on May 31, 2007. This Supplemental Letter of Findings results.

I. Controlled Substance Excise Tax - Commencement of Collection Proceedings.

DISCUSSION

IC § 6-7-3-5 imposes the Controlled Substance Excise Tax on the possession of marijuana in the State of Indiana. All tax assessments are presumed to be valid. IC § 6-8.1-5-1(b). The Taxpayer bears the burden of proving that any assessment is incorrect. *Id.*

The Department may commence collection of the controlled substance excise tax only if it follows the requirements set forth at IC 6-7-3-19(2) as follows:

> Is notified in writing by the prosecuting attorney of the jurisdiction where the offense occurred that the prosecuting attorney does not intend to pursue criminal charges of delivery, possession, or manufacture of the controlled substance that may be subject to the tax required by this chapter.

The issue to be determined is whether or not the Prosecutor intended to criminally prosecute the Taxpayer.

The Department received a letter from a Deputy Prosecutor of the county where the marijuana was found. This letter stated that the Prosecutor's Office was "unable to prosecute these large scale marijuana dealers criminally." The Department considered this statement to meet the statutory requirement that the Prosecutor did not intend to criminally prosecute the Taxpayer for the possession of the marijuana.

The Taxpayer argued that the Department did not receive a letter that conformed to the statutory requirement. The Taxpayer argued that the Prosecutor did actually press and vigorously litigate criminal charges against the Taxpayer stemming from the marijuana found in the Taxpayer's house. The Prosecutor did not cease the litigation until ordered to do so by the Judge. According to the Taxpayer, the vigorous prosecution prior to the assessment evidenced that at one time the County Prosecutor had actually intended to press criminal charges. Therefore, the statutory requirement for the commencement of collection of the controlled substance excise tax was not met.

Statutory construction is governed by IC § 1-1-4-1(1) which states "[t]he construction of all statutes of this state shall be by the following rules, unless such construction is plainly repugnant to the intent of the legislature or of the context of the same statute... Words and phrases shall be taken in their plain, or ordinary and usual sense.... When construing a statute, a court is to give the statutory words and phrases their plain, ordinary, and usual meaning unless the legislature's intent reveals a contrary purpose*. Park 100 Dev. Co. v. Indiana Dep't of State Revenue*, 429 N.E.2d 220 (Ind. 1981).

The word "intend" is defined in the *Webster's II New Riverside University Dictionary*, 635 (1988) as "To have in mind: plan." This is clearly a verb anticipating that something will be done in the future. Following a course of action in the past does not meet the definition of "intend" as the Taxpayer alleged.

The statute does not require that the Prosecutor affirm that he never intended to pursue or never pursued criminal charges in the past as argued by the Taxpayer. Rather the statute has the word "intend" in the present tense, saying "does not intend to pursue criminal charges." Since the dictionary lists "plan" as a synonym for "intend," it is clear that the statute requires that the prosecutor not envision pursuing criminal charges in the future. Criminal charges pursued in the past do not keep the Department from subsequently assessing and collecting the criminal substance excise tax. Since the letter states that the Prosecutor is not able to pursue criminal charges – no matter the reason that the Prosecutor cannot do so in the future – the Department is able to collect the subject controlled substance excise tax from the Taxpayer.

The Taxpayer also contended that the Deputy Prosecutor made factual errors in the letter to the Department. If the statements made by the Deputy Prosecutor which the Taxpayer disputed were actually incorrect, it would not have had an impact on the determination that the letter indicated that the Prosecutor would not pursue criminal action against the Taxpayer in the future. The Deputy Prosecutor properly requested the Department to proceed with the assessment and collection of the CSET.

FINDING

The Taxpayer's protest is respectfully denied.

II. Controlled Substance Excise Tax – Duplication of Assessment.

DISCUSSION

Pursuant to IC § 6-7-3-5, the Department assessed CSET against both the Taxpayer and her husband because each possessed the marijuana found in their house. The Taxpayer argued that since there was only one quantity of marijuana discovered at the house, there should only have been one assessment of CSET.

An excise tax is a tax "imposed upon the performance of an act or the enjoyment of a privilege." *Black's Law Dictionary* 506 (5th ed. 1979.) In the case of CSET, the tax is imposed on the performance of the act of possessing, delivering, or manufacturing of a controlled substance. The tax is not imposed on the controlled substance itself. Both the Taxpayer and her husband performed the act of possessing the controlled substance, marijuana. Therefore, there were two taxable events. The Department properly imposed the excise tax on each person's possession of the marijuana.

FINDING

The Taxpayer's protest is respectfully denied.

III. Controlled Substance Excise Tax – Double Jeopardy.

DISCUSSION

The Taxpayer argued that the CSET assessment violated her protections under the double jeopardy provisions of the United States Constitution. Pursuant to the Double Jeopardy Clause, no person can be "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. In plain English, this means that a person cannot be put at risk of criminal punishment twice for the same offense.

There are three court actions at issue here. First, the state filed criminal charges against the Taxpayer for the possession of marijuana. Those charges were dismissed. Secondly, the state filed a civil forfeiture action against the Taxpayer. Pursuant to this action, the state actually took possession of the Taxpayer's property. After the judge ruled against the state, the Taxpayer's property was returned. Finally, the Department issued a jeopardy assessment of taxes, interest, and penalty.

The Taxpayer and the Department agree that the Taxpayer was not put in jeopardy or at risk of punishment for the original criminal action. The Taxpayer and the Department also agree that the Department's issuance of the jeopardy assessment put the Taxpayer in jeopardy. The issue to be determined is whether or not the Taxpayer's appearance before the judge in the forfeiture action also subjected the Taxpayer to jeopardy or risk of punishment. If it did, then the Department's action would be barred by the Taxpayer's constitutional prohibition against being put at jeopardy twice for the same offense.

Traditionally, jeopardy has only applied to criminal actions. There are a few civil actions that are so closely related to a punitive criminal action or quasi-punitive that they are considered to be placing a person in jeopardy. Tax assessments generally are civil actions. However, the Indiana Supreme Court held that the Department's issuance of a jeopardy assessment in a CSET assessment places a taxpayer in jeopardy for purposes of the Double Jeopardy clause of the Fifth Amendment. *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995).

The forfeiture cause was a civil action. The Taxpayer argued that the forfeiture cause was quasi-punitive like the CSET jeopardy assessment. The Taxpayer did not, however, produce any court cases or other evidence

establishing that a forfeiture action resulting from criminal activity has been officially determined to be the equivalent of a criminal proceeding for purposes of the double jeopardy protections of the United States Constitution.

FINDING

The Taxpayer's protest is respectfully denied.

IV. Controlled Substance Excise Tax – Exclusion of Evidence.

DISCUSSION

The Taxpayer protested the assessment of CSET based upon evidence that was excluded from the criminal trial. The marijuana used as a basis for the imposition of CSET was excluded from the criminal trial because it was seized pursuant to an illegal search; thus violating the Taxpayer's protections against unlawful searches and seizures. U.S. Const. amend. IV.

The Indiana Supreme Court dealt with this issue in *Indiana Dep't. of Revenue v. Adams,* 762 N.E.2d 728 (Ind. 2002). In this case, the police searched Mr. Adams' safety deposit box and found cocaine. The trial court suppressed the evidence of the cocaine because it was seized pursuant to an illegal search. The state withdrew the criminal charges relating to the cocaine. Later, the Department assessed CSET based upon the cocaine discovered in the illegal search. The court ruled that the Department was entitled to use the suppressed evidence as the basis for its imposition of CSET on the possession of the cocaine. The Taxpayer attempts to differentiate his case by pointing to the intervening forfeiture action. That intervening action, does not, however materially distinguish the cases. In both cases controlled substances were discovered pursuant to a search that was judicially determined to be in violation of the defendants' Fourth Amendment protections. In each case, the controlled substance was properly suppressed in the criminal action. Also, in each case the controlled substance can constitutionally be used as the basis for a CSET assessment.

FINDING

The Taxpayer's protest is respectfully denied.

V. Controlled Substance Excise Tax – Calculation of Tax.

DISCUSSION

The Department calculated the amount of the assessed tax by following the procedures set out at IC § 6-7-3-6. The Taxpayer protested the calculation of the CSET and requested that the marijuana be reweighed.

All tax assessments are presumed to be valid. IC § 6-8.1-5-1(b). The Taxpayer bears the burden of proving that any assessment is incorrect. *Id.*

The Department weighed the marijuana. The Taxpayer was unable to present any documentary evidence to demonstrate that there were inconsistencies or mistakes in the weights used to calculate the amount of tax. The Taxpayer did not sustain his burden of proving that the amount of the tax was calculated incorrectly.

FINDING

The Taxpayer's protest is respectfully denied.

VI. Tax Administration –Penalty.

DISCUSSION

Taxpayers are required to remit CSET at the time they obtain the controlled substance. If a taxpayer fails to pay the tax at the time of acquisition, the taxpayer is subject to a one hundred percent penalty. IC § 6-7-3-11. The Taxpayer did not timely remit the tax. Therefore, the Department properly imposed the penalty.

FINDING

The Taxpayer's protest is respectfully denied.

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